IN THE

Supreme Court of the United States

October Term, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC. and JOHN ANDERSON, Manager of the NEW YORK GASLIGHT CLUB, INC.,

Petitioners,

against

Ms. CIDNI CAREY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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Opinions Below and Jurisdiction of This Court

This is an appeal from an order entered on May 8, 1979 by The United States Court of Appeals for the Second Circuit, 598 F2d 1253, which, by a divided court, reversed the order and decision of the U.S. District Court for the Southern District of New York (Henry F. Werker, U.S.D.J.) 458 F.Supp.79. Jurisdiction of this Court is based on 28 U.S.C. Sec. 1254(1), a writ of certiorari having been issued by this Court on October 9, 1979.

Statutes Involved

This case involves the construction of Section 706(k) of Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 259, 42 U.S.C. 2000e-5(k) which provides that:

> "In any action or proceeding under this subchapter the court in its discretion may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

The provisions of Section 706(c) of Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 259, 42 U.S.C. 2000e-5(c) likewise bear upon the issues. That section provides:

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a

> written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

In the resolution of this controversy, consideration need also be given to the import of Section 297(4)(a) of the Executive Law of the State of New York, which provides that:

> "Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the board has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complaint may be presented solely by his attorney. No person

who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made."

Questions Presented for Review

1. Does Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), authorize an award of attorney's fees for services rendered in a New York State proceeding where that State does not authorize such attorney's fees

but provides counsel to present the case in support of the complaint?

2. Was the decision of Judge Werker an appropriate exercise of discretion by the District Court so that the reversal and remand directed by the United States Court of Appeals for the Second Circuit was erroneous?

Statement of the Case

Respondent prosecuted a complaint against the Petitioners and another in which she charged said persons with unlawful discrimination on the basis of her race (A 3). The Respondent succeeded as against the Petitioners but did not succeed as against the third party named in the State proceedings (A 70). While review of the order of the New York Division of Human Rights was pending before the courts of New York, the Respondent received a notice of right to sue from the Equal Employment Opportunity Commission (A 3, 4, 30). Within the statutory 90-day period, this action was commenced in the United States District Court in order to preserve Respondent's rights (A 4, 29). In July, 1978, the New York State proceedings having been concluded in favor of the Respondent and against the Petitioners, and having afforded to her all the relief sought in the Federal action other than attorney's fees, the action in the District Court, which had been commenced only against the Petitioners, was dismissed (A 35). By affidavit verified April 17, 1978 which was filed prior to the order of dismissal, Respondent applied for an award of attorney's fees (A 36-51 inclusive). The application for attorney's fees was denied by Judge Werker (A 24-28 inclusive). Respondent thereafter moved for modification of Judge Werker's decision and for leave to supplement the record (A 52-61 inclusive). Such application was denied by Judge

Werker. A copy of such memorandum of denial is not included in the appendix because the same is not available in the Court files. Upon appeal to the Circuit Court of Appeals for the Second Circuit, a divided court reversed and remanded the case to Judge Werker (A 1-23 inclusive).

ARGUMENT

I

Section 706(k) of the Civil Rights Act of 1964 does not authorize the award of fees for services rendered in proceedings before the New York State Courts and administrative agencies.

This case involves a conflict between the power granted to Congress by the Fourteenth Amendment to the Constitution and the power reserved to the states by the Tenth Amendment to the Constitution.

Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), does not purport to create a new cause of action for legal fees for services rendered to vindicate the rights of persons deprived of their constitutional rights. That statute merely provides that a court may allow a prevailing party "a reasonable attorney's fee as part of the costs . . .". Congress has the power to establish costs to be paid to a prevailing party in a litigation before the United States Courts or a United States Administrative Agency. The several states, on the other hand, in the exercise of their governmental functions have the power to control their own judicial systems and their administrative agencies.

The State of New York in its Human Rights Law which anteceded the Civil Rights Act of 1964, in Section 297(4)(a)

of the Executive Law, provided in part for the operation of its Division of Human Rights and for the procedure applicable to the processing and/or hearing of complaints before said Division. It set forth that "the case in support of the complaint shall be presented by one of the attorneys or agents of the Division and at the option of the complainant by his attorney. With the consent of the Division, the case in support of the complaint may be presented solely by his attorney." This is the manner in which the State of New York has provided for the prosecution of complaints before its Human Rights Division. The question posed is whether Congress, by enactment of Section 706(k) of the Civil Rights Act of 1964, can or did alter the statutory scheme of the New York law.

The Executive Law of New York does not authorize the payment of attorney's fees to prevailing parties and the New York Court of Appeals has determined that such fees are not allowable, *State Division of Human Rights* v. *Luppino, et al.*, 29 NY 2d 558 (1971).

The New York Court in the cited case, decided after the enactment of the Civil Rights Act of 1964, did not believe that the attorney's fees provisions contained in Section 706(k) of said Act applied to New York proceedings.

Congress has deferred to the State control of proceedings to vindicate Title VII rights. Section 706(c) 1964 Civil Rights Act, 42 U.S.C. 2000e-5(c). Does that deferral not imply a Congressional intent that all of the procedural aspects incident to such proceedings should be determined by the several states?

This Court, in *Florida* v. *United States,* 282 US 194, indicated, at page 211, that " . . . whenever the Federal power is exerted within what would otherwise be the domain of state power the justification of the exercise of the Federal power must clearly appear".

In *Florida Avocado Growers* v. *Paul,* 373 US 132, at page 142, this Court pointed out "the principle to be derived from our decision is that Federal regulation of field of commerce should not be deemed preemptive of State regulatory power in the absence of persuasive reasons—whether that the nature of the regulated subject might permit no other conclusion, or that the Congress has unmistakedly so ordained".

In *Schwartz* v. *Texas,* 344 US 199, at page 202, this court said "it will not be presumed that a Federal statute was intended to supersede the exercise of power of the State unless there is a clear manifestation of intention to do so. The exercise of Federal supremacy is not lightly to be presumed".

This court has pointed out in *Christiansburg Garment Co.* v. *EEOC,* 434 US 412, at page 420, that the legislative history of Section 706(k) is sparse.

Putting aside the question of whether the interpretation of 706(k) as authorizing an award of legal fees by a U.S. District Court for services rendered in a state proceeding would lead to an unconstitutional result, as an unwarranted interference with the sovereignity of the states, there is no legislative history or clear mandate in the language of this statute to justify the interpretation made by the Second Circuit in this case.

Judge Mulligan pointed out in his dissent below:

> "It seems to me to be fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency and provided for judicial review." (A 16).

Congress does not normally legislate on the subject of costs in state proceedings. Had it intended to do so, it should have clearly manifested such intention. It did not.

The Second Circuit has, we respectfully submit, also misinterpreted the relationship of the Federal Government to the states in the enforcement process under Title VII of the 1964 Civil Rights Act. The deference to the state mechanism is not an integral part of the Federal enforcement process. The state mechanism is primary. The Federal mechanism is a stand-by procedure, only to be brought into play if the state mechanism fails to function.

Senators Dirksen and Humphrey, co-sponsors of the State Deferral Section, made the following comments regarding the Federal-State relationship in Title VII matters.

Sen. Dirksen:—This section was enacted ". . . to keep primary, exclusive jurisdiction in the hands of the State Commission for a sufficient period of time to let them work out their own problems at the local level." 110 Cong. Rec. 13087 (1964).

Sen. Humphrey commented that a fundamental policy of the EEOC Act is to avoid Federal action whenever possible by deferring to the State or local authority where such authority provides for the processing of discrimination claims, 110 Cong. Rec. 12701, 12708, 13088 (1964).

Salutary though its motives may be, Section 706(k) of the 1964 Civil Rights Act is not so necessary to the functioning of Title VII as to justify impingement on the inherent powers of the states, nor should it be interpreted to extend to state proceedings in the absence of a clear indication of Congressional intent to make it applicable to such litigated or administrative proceedings.

II

The District Court in its discretion denied respondent's application for attorney's fees and such exercise of discretion should not have been overturned by the Circuit Court of Appeals.

Section 706(k) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-5(k) and the holding of this court in *Christiansburg Garment Co.* v. *EEOC, supra,* established that the award of attorney's fees as a part of costs are a matter of discretion for the District Court.

Judge Werker's memorandum decision (A 24-28 inclusive) was predicated on his analysis of the circumstances of the litigation. He was of the opinion that the EEOC was in error in issuing the right to sue letter (A 26). He also believed that the New York law afforded Respondent the option of obtaining counsel supplied by the New York Division of Human Rights without cost to her (A 27). Respondent and her counsel did not expect legal fees from Petitioner and should not, in Judge Werker's view, obtain a windfall (A 27). Nowhere did Judge Werker question his power to award attorney's fees.

It is fundamental that where discretion is vested in a Court, the fact that an appellate tribunal might have come to a different conclusion is insufficient grounds for reversal. Unless there was an abuse of discretion, the lower court decision is inviolate.

The Circuit Court of Appeals in this case, in order to justify its reversal, drew a distinction between the presentation of a case "in support of a complaint" mandated by New York Executive Law, 297(4)(a), and the presentation of a case in support of a plaintiff. We submit that this is a distinction without substance. Although there might be

certain circumstances where relief had been denied to the complainant by the Division of Human Rights whereby the position of the attorney for the Division was at variance with the interest of the complainant before it, that is not a circumstance which occurred in this case.

When this case was heard before the New York Division of Human Rights, the Respondent elected to engage her own counsel, who assisted her ably and well, but the Hearing Officer participated actively in the presentation of evidence in support of the complaint to the point where the Petitioner here urged in the proceedings to review the determination of the Division of Human Rights that the Hearing Officer's conduct exceeded the bounds of propriety. There is nothing in this record from which it can be surmised that the result would have been different had the case in support of respondent's complaint been presented solely by the attorneys for the Division.

Counsel in this case was supplied to the Respondent by the NAACP Special Contribution Fund, Inc. This factor may well have been an element considered by Judge Werker when he referred to a windfall which neither plaintiff nor her counsel expected and poses the question of whether or not a public interest law firm is entitled to recover attorney's fees. Counsel is unaware of any case in which this question has been considered by this Court. The NAACP Special Contribution Fund, Inc., is subsidized in part by the tax exempt status accorded it under the Internal Revenue Code. Such status precludes it from engaging in profit-making ventures, either directly or through its employed counsel.

This Court suggested in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, and in *Christiansburg Garment Co.* v. *EEOC, supra,* that legal fees, or compensation, are an im-

portant motive in encouraging private attorneys general to vindicate constitutional rights.

We do not believe that the history of the NAACP warrants the conclusion that it requires an award of counsel fees to stimulate its interest in a just cause. The award of counsel fees in the facts of this case, are punitive only and not salutary.

Whether one agrees with the conclusions of Judge Werker, or not, certainly his conclusions were not an abuse of the discretion vested in him by the applicable statute.

CONCLUSION

It is respectfully submitted that, for the reasons stated herein, the decision of the Circuit Court of Appeals for the Second Circuit should be reversed and that of the District Court reinstated.

Respectfully submitted,

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